Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-582

CHASE BRASS AND COPPER CO., INCORPORATED,
Appellant,

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Court of Appeal of California,
First Appellate District

Appellant's Reply to Motion to Dismiss or Affirm

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Most of the argument in support of the State's Motion was anticipated by the Appellant and has been answered in its Jurisdictional Statement. This reply is limited to responding to the unanticipated.

1. In the footnote on page 35, the Board states that the record does not show when Chase's California property was acquired. Attached hereto as Exhibit A is a copy of the letter from C. R. Foote, Manager of Taxes of Chase Brass and Copper Co., dated September 29, 1972, which was admitted into evidence as Exhibit 3 at the trial held

on October 11, 1972. The Deputy Attorney General then handling the case stipulated that if Mr. Foote were in court and sworn as a witness he would testify "as stated in the letter and that he prepared these from the books and records." Reporter's Transcript, page 20. As a part of Exhibit A we have attached reproductions of pages 19 and 20 of that reporter's transcript, in order that the Court may observe the Appellee's stipulation at the trial and the fact that the letter was admitted to evidence without objection and as proof of the contents of the letter.

Accordingly, the fact is in the Record. The fact was relied upon by Appellant in its illustrative argument that California property was valued at current value and the out-of-state mines at an ancient value no longer representative of current value.

2. The Board has repeatedly referred to events occurring in 1958, and once to an event occurring late in 1956, which events were not relied upon by the Court of Appeal in support of the conclusion for which the Board now urges them. Presumably this was because the Court was cognizant of the validity of our contention that events occurring after the years in issue could not support the unitary nature of the business in the years before the Court. The principal example of the Board's use of later events in its Motion is in respect of the Okonite acquisition, which was recommended in 1958 by a vice-president of Kennecott. Motion, p. 18.

3. The Board would have this Court believe that *John Deere Plow Co. v. Franchise Tax Board*, 38 Cal. 2d 214, 238 P. 2d 569, appeal dismissed 343 U.S. 939, involved a contention that the Franchise Tax Board should not have consolidated the various corporations comprising the Deere group. Neither in the California Supreme Court, as the

opinion of that Court will demonstrate, nor before this Court, did John Deere Plow Co., contend that the various corporations in the group should not be consolidated. Hence that issue was not decided by either Court in that case. This argument by the Board is at page 25 of its Motion.

4. The Board has contended at page 14 of its Motion that its practice of consolidating commonly-owned corporations has been in existence for many years without challenge. In support of that contention the Board points to the fact that this is only the second reported case in which it has been challenged in court. The Board has not informed this Court that there are numerous cases pending in the California courts involving the same issue, which are being delayed in presentation for decision pending the outcome of this case.

This case has been well-known in California for years because it has been in the courts for years. It involves the income years 1954, 1955, and 1956. The trial court first decided the case in favor of Appellant in the preceding decade. The real explanation for the paucity of decided cases can be seen from those circumstances. The pace of litigation in the California courts is not fast.

5. We have been criticized at pages 33 and 34 for failing to mention *McDonnell-Douglas Corp. v. Franchise Tax Board*, 69 Cal. 2d 506, 72 Cal. Rptr. 465, 446 P. 2d 313 (1968). We do not see its relevance to the issues we have raised here, but it does not support the Franchise Tax Board's characterization of all evidence showing the arbitrary workings of the formula as untrustworthy separate accounting. Records of property owned and leased, receipts from aircraft sales drawn from corporate books of account, and certain other matters of evidence were what the California Supreme Court relied on in *McDonnell-Douglas*. There

the Franchise Tax Board had failed to include one class of property in the property factor, and the California Supreme Court disapproved what the Franchise Tax Board had done. The State Supreme Court had no occasion to consider whether the entire net income of a corporation as shown by its books and records under generally recognized accounting methods should be disregarded as "mere separate accounting."

6. The Board's Motion confuses the Board's attitude with that of the Court of Appeal. The Court of Appeal in Chase I held that the sales of copper by Kennecott to Chase were not enough to make the two businesses unitary with each other. Also it held that Kennecott's *copper operations* were unitary with Chase, not the entire corporate business. The Attorney General has never accepted that part of the decision as correct and continuously imputes his own views to the California Court of Appeal.

7. We have stated that separate accounting is a geographic concept limiting economic activities to the taxing state. The respondent agrees with that position (Motion to Dismiss or Affirm, p. 10, second paragraph), and acknowledges that that was the limit of the concept as used before this Court in *Butler Bros. v. McColgan*, 315 U.S. 501 (1942). Respondent asserts that the California Court of Appeal has expanded that concept (footnote 4 on p. 10 of its Motion) although that expansion is not obvious from the portions referred to, but in any case the respondent's expanded concept of separate accounting has never been approved by this Court.

CONCLUSION

This case should be given plenary consideration and the decision below reversed.

Respectfully submitted,

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(Exhibits follow)

Exhibit A

CHASE BRASS & COPPER CO.
—Incorporated—
Subsidiary of Kennecott Copper Corporation
20600 Chagrin Boulevard, Cleveland, Ohio 44122

Telephone 216 283-3900
September 29, 1972

CHASE

Valentine Brookes, Esq.
Brookes, Maier and Wilson
3810 Security Pacific Building
One Embarcadero Center
San Francisco, California 94111

Dear Mr. Brookes:
The following information is provided from the books of Chase Brass & Copper Co., Incorporated:

1. *Original Cost Values for Property Described* — *From Books @ December 31st*

	1954	*1955*	*1956*
Building	$286,762.25	$286,762.25	$286,762.25
Machinery & Equip.	137,289.22	137,289.22	137,348.59
Motor Vehicles	15,014.98	16,939.78	15,748.84

2. The building was capitalized in August, 1954. The machinery and equipment were acquired in 1954 except for $462.24 which was acquired in 1956. The motor vehicles were acquired at various times during each of the years involved.
3. The land was acquired on August 25, 1953.

If you have any questions on the above information please call me at (216) 283-3161. Although I will be out of the office next week my secretary will be able to reach me.

Very truly yours,
C. R. Foote
Manager of Taxes

CRF:rk

record, is the dates of acquisition and the original cost of these properties on the books at the close of business at each of the three years in question.

Mr. Klee, may it be stipulated that this letter may go in evidence as evidence of the facts stated in the letter to the same extent as if Mr. Foote were in court, were sworn and testified that he prepared the letter and the figures in it from the books and records under his supervision and control?

MR. KLEE: I will stipulate that if Mr. Foote were in court and were called and sworn he would testify precisely as stated in the letter. I will not stipulate Mr. Brooke's characterization of the letter is correct, simply that if he was called to testify he would state exactly what is stated in the letter.

THE COURT: All right, so stipulated.

MR. BROOKES: Very well, Your Honor, may I offer this as Exhibit—Plaintiff's Exhibit 1 and now may I ask—

THE COURT: I think the books are one and two and the letter is three.

(Thereupon the aforementioned items were marked and received as Plaintiff's Exhibits 1, 2 and 3, respectively, into evi lence)

MR. BROOKES: I have one question of Mr. Klee, concerning Plaintiff's Exhibit No. 3. Mr. Klee restrained from stipulating Mr. Foote would testify the books of account from which these figures were taken are under his supervision and that he took the figures from those books of account.

I have a witness who can prove that, who is here, Your Honor.

THE COURT: Is that stipulated to, Mr. Klee?

MR. KLEE: You put me in a dilemma. I have no way of knowing whether that is true or not. I will accept the fact that if he were sworn and testified—called to testify, he would state as stated in the letter and that he prepared these from the books and records.

MR. BROOKES: That is the essential part of what I asked Mr. Klee to stipulate to. Thank you, Mr. Klee.

THE COURT: Are you ready to proceed with your first witness?

The Clerk informs me that there is only one book in the records.

MR. BROOKES: Your Honor, in the stipulation of facts, my attention has been called to the circumstances, that the phraseology of the stipulation of facts requires a ruling of the Court admitting into evidence and not merely a stipulation of the parties, I am afraid, because of this, in paragraph 38 of the stipulation of facts, the one which identifies the exhibits, it uses this language there: "May be introduced into evidence as a part of this stipulation of facts, the following exhibits—" and in it it identifies them all.

Your Honor, the parties have stipulated that the stipulation of facts and the exhibits which were a part of it may be introduced into evidence. May I ask Your Honor for a ruling that they have been admitted into evidence, including the exhibits?

THE COURT: So ordered. This will be admitted into evidence as Plaintiff's next in order. It will be Plaintiff's 4, A, B, C, et cetera.

MR. BROOKES: Thank you, Your Honor.

(Thereupon the aforementioned items were marked and received as Plaintiff's Exhibits 4, A, B, C, in accordance with Paragraph 38 of Stipulation of Facts)